92-1593

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JIMMY LEE PENIX, *Petitioner*
v.
UNITED STATES PAROLE COMMISSION

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner served more than five years on federal parole before a violator's warrant was issued. The Parole Commission neither held a hearing nor made a required finding to extend supervision beyond five years. This case presents the following questions:

1. In the absence of facial ambiguity, may the courts look to legislative history to interpret a statute?

2. Under a federal statute that requires an affirmative finding for the Parole Commission to extend its jurisdiction beyond five years, may the agency extend its jurisdiction de facto without such finding by mere delay in taking administrative action?

3. Does the federal parole statute create a liberty interest in termination of supervision after five years?

LIST OF PARTIES

JIMMY LEE PENIX, Petitioner

UNITED STATES PAROLE COMMISSION, Respondent

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No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

JIMMY LEE PENIX
PETITIONER

vs.

UNITED STATES PAROLE COMMISSION
RESPONDENT

ON APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF JURISDICTION

Certiorari is sought from the judgment of affirmance dated December 21, 1992, of the United States Court of Appeals for the Fifth Circuit. No rehearing was sought. Jurisdiction in this Court is founded upon 28 U.S.C. § 1254. Jurisdiction of the case in the United States District Court was founded upon 28 U.S.C. § 1346.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

I. *18 U.S.C. §4211 (c)(1)*

"Five years after each parolee's release on supervision, the Commission shall terminate supervision over such parolee unless it is determined, after a hearing conducted in accordance with the procedures prescribed in 18 U.S.C. 4214(a)(2), that such supervision should not be terminated because there is a likelihood that the parolee will engage in conduct violating any criminal law."

II. *18 U.S.C. §4210*

"Jurisdiction of Commission:

...

"(b) Except as otherwise provided in this section, the jurisdiction of the Commission over the parolee shall terminate no later than the date of the expiration of the maximum term or terms for which he was sentenced, except that --

> (1) such jurisdiction shall terminate at an earlier date to the extent provided under section 4164 (relating to mandatory release) or section 4211 (relating to early termination of parole supervision)...."

III. *28 C.F.R. § 2.43*

"(c)(1) Five years after release on supervision, the Commission shall terminate supervision over such parolee unless it is determined, after a hearing conducted in accordance with the procedures prescribed in 18 U.S.C. 4214(a)(2), that such supervision should not be terminated because there is a likelihood that the parolee will engage in conduct violating any criminal law...."

STATEMENT OF THE CASE

I. Procedural background

Petitioner filed this action to enjoin the execution of a parole violator's warrant in the U.S. District Court for the Northern District of Texas. The United States was the defendant and the District Court acquired jurisdiction pursuant to 28 U.S.C. § 1346. The court summarily denied temporary and permanent injunctive relief. Petitioner appealed, and on December 21, 1992, the U.S. Court of Appeals for the Fifth Circuit affirmed.

II. Factual background

Penix was sentenced to a term of 15 years by the U.S. District Court, Western District of Oklahoma on June 2, 1981. He served five years and four months, and was paroled on August 4, 1986.

On August 12, 1991, after the expiration of five years of parole supervision, the Commission sent Penix Parole Form H-36, entitled "Early Termination Notice/Waiver."

Penix signed the form, requesting a termination hearing.

Penix continued on parole uneventfully until the Commission issued a violator's warrant on April 9, 1992.

No hearing was held before the warrant was issued.

III. Proceedings and rulings below

On April 14, 1992, before the warrant was executed, Penix filed suit in the district court seeking temporary and permanent injunctive relief, enjoining the Commission from

executing the warrant because its jurisdiction had expired under the statute and regulations. Both the parole statute, 18 USC §4211(c)(1), and the U.S. Parole Commission's regulations, 28 CFR §4.23, provide that parole jurisdiction over the parolee shall terminate five years after release on parole, unless it is determined after a hearing that there is a likelihood the parolee will engage in conduct violating the law.

On April 20, 1992, the trial court entered an order denying Petitioner's application for Temporary Restraining Order, Temporary Injunction and Permanent Injunction.

Penix appealed to the United States Court of Appeals for the Fifth Circuit, and on December 21, 1992, the judgment was affirmed. *Penix v. U. S. Parole Commission*, 979 F.2d, 396 (5th Cir. 1992).

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS CONTRADICTS THE PLAIN LANGUAGE OF THE STATUTE

It was erroneous for the court of appeals to reach outside the plain meaning of the statute to avoid the statute's mandatory import. In so doing, the Fifth Circuit has joined the Ninth[1] and Eleventh[2] Circuits in following the erroneous analysis in United States ex rel *Pullia v. Luther*, 635 F.2d 612, 614-16 (7th Cir. 1980). In *Pullia*, the Seventh Circuit held that the "Shall terminate... unless," language in section 4211(c)(1) fails to create an automatic termination where the required finding is absent. To reach this conclusion, the Pullia court went behind the plain meaning of the statute to committee reports, believing the statute to be ambiguous; that court could not reconcile the differences between the mandatory and permissive language of the statute. But the statute is not ambiguous, and reference to the committee reports are not

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[1] *Tatum v. Christensen*, 786 F.2d 959, 963 (9th Cir.), overruled on other grounds sub nom. *Wallace v. Christensen*, 802 F.2d 1539, 1554 (9th Cir. 1986) (en banc).

[2] *Sacasas v. Rison*, 755 F2d 1533 (11th Cir. 1985).

justified.

The language of a clearly written statute is regarded as conclusive, *Bread Political Action Committee v. Federal Election Comm'n*, 455 U.S. 577, 580, 102 S. Ct. 1235, 1237, 71 L.Ed.2d 432 (1982). Legislative history or policies should not support a construction of a criminal statute broader than its text. *Crandon v. United States*, 494 U.S. 152, 110 S. Ct. 997, 108 L.Ed 2d 132 (1990). "In determining the scope of a statute, we look first to its language," *United States v. Turkette*, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed 2d 246 (1981). The literal construction of a statute must be given effect unless such construction would produce a result that is absurd, unjust or clearly contrary to policy of the underlying statute, *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed 563 (1955), so as to lead the court to the conclusion that congress could not possibly have so intended, *Public Citizen v. U.S. Dept. of Justice, 491 U.S. 440*, 109 S.Ct 2558, 105 L.Ed. 2d 377, (1989), (Kennedy, J., concurring).

The danger of consulting legislative debate or committee reports is twofold: support for competing contentions will often be found; and the rule of law is further obscured.

> "It may well be true that in most cases the proposition that the United States Code or the Statutes at Large give adequate notice to the citizen is something of a fiction, [citation omitted], albeit one required in any system of law; but necessary fiction descends to needless farce

when the public is charged with knowledge of Committee Reports."

United States v. R.L.C., ___U.S. ____, ____ S.Ct. ____, 117 L.Ed.2d 559, 574 (1992), (Scalia, J., concurring).

Section 4211(c)(1) is clear and unambiguous, permitting no reliance on committee reports or legislative debate. Section 4211(c)(1) is remarkably parallel to the language analyzed by this Court in a recent parole case, which reached an opposite result. In *Board of Pardons v. Allen*, 482 U.S. 369, 107 S. Ct. 2415, 96 L.Ed.2d 303 (1987), the Court construed a Montana parole statute with nearly identical mandatory release language and found it to be unambiguous. A parole statute creates a liberty interest protected by due process if it meets two criteria: the statute uses mandatory language; and the statute sets forth substantive predicates which place significant limits on the board's discretion.

The "shall terminate" language of §4211(c)(1) is identical to the "shall release" language of the Montana statute construed in Allen. The Court held that a statute which prescribes release in mandatory terms "unless" or "if" or "when" or "subject to" any factual criteria creates a liberty interest in release. The substantive predicate in 4211 (c)(1) is the requirement of a finding to extend supervision beyond five years. If the finding is not made (as here) the statute mandates termination. *Allen*, at 482 U.S. 378, n.10 states:

"When statutes or regulatory provisions are phrased in

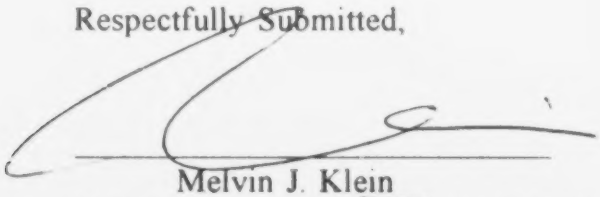
mandatory terms or explicitly create a presumption of release, courts find a liberty interest. See *Parker v. Corrothers*, 750 F2d 653, 661 (CA8 1984) (Arkansas regulation); *Mayes v. Trammell*, 751 F2d 175, 178 (CA6 1984) (Tennessee Board of Parole Rule); *Williams v. Missouri Board of Probation and Parole*, 661 F2d 697, 698 (CA8 1981), cert denied, 455 US 993, 71 L Ed 2d 855, 102 S Ct 1621 (1982) (Missouri statute). Conversely, statutes or regulations that provide that a parole board "may" release an inmate on parole do not give rise to a protected liberty interest. See *Dace v. Mickelson*, 797 F2d 574, 576 (CA8 1986) (South Dakota statute); [...] *Irving v. Thigpen*, 732 F2d 1215, 1216 (CA5 1984)."

The liberty interest of a parolee is not trivial, and its continuation is protected by at least some measure of due process, *Morrissey v. Brewer*, 400 U.S. 471, 92 S.Ct. 2593, 33 L.Ed 2d 484 (1972). The parolee has an expectation of absolute freedom when his conditional liberty matures at the end of the period of supervision, *Hyser v. Reed*, 318 F.2d 225, 235 (D.C. Cir. 1963). Section 4211 (c)(1) plainly dictates that this occurs at the end of five years of supervision unless the required finding is made. As this Court states about the Montana parole board in *Board of Pardons v. Allen*, the Commission has extremely broad discretion in making the finding, but, absent the finding, has no discretion in failing to terminate supervision.

PRAYER FOR RELIEF

WHEREFORE, for the reasons set forth, Petitioner Jimmy Lee Penix respectfully prays that a writ of certiorari be granted to review the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully Submitted,



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APPENDIX FOLLOWS

Jimmy Lee PENIX,

Plaintiff--Appellant

v.

UNITED STATES PAROLE COMMISSION,

Defendant -- Appellee

No. 92-1364

UNITED STATES COURT OF APPEALS,

FIFTH CIRCUIT

Dec. 21, 1992

Appeal from the United States District Court for the Northern District of Texas.

Before GOLDBERG, JOLLY and, WIENER, Circuit Judges.

PER CURIAM:

In this case, Petitioner--Appellant Jimmy Lee Penix appeals the district court's denial of injunctive relief against Respondent-Appellee United States Parole Commission. Penix sought to enjoin the Commission from executing a parole violator warrant issued against him. The district court rejected Penix's assertion that, as the Commission failed to hold a hearing within five years following the commencement of his parole term, that term automatically expired - as did the Commission's jurisdiction over him. Finding no reversible error, we affirm.

I.

FACTS AND PROCEDURAL HISTORY

Penix was convicted in the Western District of Oklahoma of conspiracy to import cocaine, traveling in interstate commerce to facilitate illegal activity, and using a communication device to facilitate the conspiracy. He was sentenced to fifteen years in prison, but was paroled on August 4, 1986, after serving five years and four months of his sentence. He was eventually placed under the supervision of the U.S. Parole Commission in the Northern District of Texas.

In August 1991, more than five years after commencement of his parole, Penix was notified by the Commission that a preliminary determination had been made to continue his parole, but that a final determination would not be made until Penix had been given an opportunity for a personal hearing before a Commission representative. Penix requested early release from parole and an in-person hearing, but no hearing was ever scheduled.

On April 9, 1992, Penix's parole officer requested the issuance of a parole violator warrant, charging Penix with conspiracy and possession of marijuana with intent to deliver, possession of cocaine, and associating with a person who has a criminal record. The Commission agreed with that request and the warrant was issued but never executed.

After the warrant was issued, Penix filed a lawsuit in

the Northern District of Texas, seeking a temporary restraining order, as well as temporary and permanent injunctions, to restrain the Commission from executing the warrant against him. Penix asserted that the Commission's jurisdiction over him had terminated after five years of supervised parole. In support of his claim, he cited 28 C.F.R § 2.43(c)(1), which mirrors 18 U.S.C. § 4211(c)(1) and provides:

Five years after release on supervision, the Commission shall terminate supervision over such parolee unless it is determined, after a hearing... that such supervision should not be terminated because there is a likelihood that the parolee will engage in conduct violating any criminal law.[1]

Penix asserted to the district court as he does here that, as the hearing did not occur before the end of his five years of supervised parole, "the jurisdiction of the Parole Commission [] terminated by operation of law," in consequence of which the Commission could not issue the warrant against him.

The district court rejected Penix's assertion, finding that §4211(c)(1) did not divest the Commission of jurisdiction automatically after five years of supervised parole. Penix timely appealed.

II.

ANALYSIS

A. Standing

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[1]Emphasis added.

The Commission asserts on appeal that Penix does not have standing to challenge the issuance of the parole violator warrant because he has not suffered a "legal injury." We have recently stated that "[s]tanding defies precise definition, but at the least insists that the complained of injury be real and immediate rather than conjectural, that the injury be traceable to the defendant's allegedly unlawful conduct, and that relief from the injury must be likely to follow from a favorable ruling."[2]

Although presently unexecuted, the execution of the parole violator warrant at any time would result in Penix's immediate incarceration, and he would remain in custody until his hearing pursuant to 18 U.S.C. § 4214(a). "To obtain equitable relief for past wrongs, a plaintiff must demonstrate either continuing harm or a real and immediate threat of repeated injury in the future."[3] The injury Penix alleges is the incarceration that would result instantaneously from the warrant's execution. If Penix is correct concerning his proffered interpretation of §4211(c)(1), then the issuance of the warrant would be unlawful and the injunction would be proper to

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[2] Society of Separationists, Inc. v. Herman, 959 F.2d 1283, 1285 (5th Cir.) (en banc) (citing Allen v. Wright, 468 U.S. 737, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984)), cert denied ___U.S.___ , 113 S.Ct. 191,____ L.Ed.2d ____ (1992).

[3] Id.

prevent unjust incarceration. Given his very real Damoclean predicament, we hold that Penix has standing to bring this lawsuit.

B. Section 4211(c)(1)'s effect on Penix's Parole

After five years of supervised parole, a hearing is required to determine whether the parole status should continue or be terminated.[4] Penix asserts that under § 4211(c)(l), his parole terminated ipso facto, exactly five years after it began, because the Commission had not yet held a hearing much less decided affirmatively to continue his parole. Penix's argument relies on the proposition that the mandatory language of the statute which provides that "the Commission shall terminate supervision ... unless it is determined after a hearing" that the parolee will likely engage in "conduct violating any criminal law"[5] must be interpreted to mean that if the hearing does not occur before the five years is completed the parole is automatically terminated. Penix's proffered interpretation of § 4211(c)(1)-- as he recognizes -- directly contravenes interpretations by the Seventh, Eleventh, and Ninth Circuits.[6]

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[4] See 18 U.S.C.§4211.

[5] 18 U.S.C. § 4211(c)(1) (emphasis added).

[6] United States ex rel. Pullia v. Luther, 635 F.2d 612,614-16 (7th Cir. 1980), Sacasas v. Rison, 755 F.2d 1533, 1535 (11th Cir.1985); Tatum v. Christensen, 786 F.2d 959, 963 (9th Cir.), overruled on other grounds sub nom. Wallace v. Christensen, 802 F.2d 1539, 1554

Penix asserts that those circuits' interpretations are incorrect and, more importantly, that a subsequent Supreme Court decision overrules their analyses. We disagree.

In United States ex. rel. Pullia v. Luther,[7] the Seventh Circuit rejected the precise argument Penix makes to us. Pullia, like Penix, "contend[ed] that under section 4211(c)(1) a hearing is a prerequisite only to a continuation of supervision, not to a termination, and that unless the Commission has held a hearing and decided to the contrary, the statute compels [the Commission] to terminate parole on the expiration of five years."[8] Pullia, like Penix, also "relie[d] on the use of the mandatory phrase 'shall terminate' in section 4211(c)(1), in contrast to the earlier use of 'may terminate' in section 4211(a)"[9] in making his argument.

The Seventh Circuit concluded that the case could not he "resolved solely on the basis of a grammatical analysis" of the difference between the mandatory and permissive language of the statute, and looked to the legislative history of the Parole Act for clarification. That legislative history forcefully demonstrated to the Seventh Circuit---and convinces us as well -- of the fallacy of Pullia's (and therefore Penix's) argument.

(9th Cir.1986) (en banc).

[7] 635 F.2d at 615.

[8] Id.

[9] Id.

The legislative history of the provision "make[s] clear that Congress intended that the Commission would exercise its judgment prior to releasing a parolee from supervision."[10] That

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[10]. Id at 616. The Seventh Circuit quoted the House and Senate sponsors of the Act, and the Section - By - Section Analysis of the House Conference Report. Representative Robert Kastenmeier stated:

> [T]here are certain decisionmaking deadlines provided for in H.R. 5727. If the Commission fails to act in accordance with these deadlines, the prisoner or parolee would not automatically be released from confinement, but he could compel the Commission to make their decision promptly.... [I]f for some reason [the Commission] were unable to meet a deadline, the prisoner or parolee could solicit the assistance of the court under existing section [28 US.C. § 1361], which is an action in mandamus to compel an employee of the United States to perform his [or her] duty. I expect these cases would be very rare, but the court would review the case and determine whether there was any justification for the delay. If there is no justification, the court would remedy the situation by ordering a hearing immediately. Otherwise, the Commission would be in contempt of court.

Id. (quoting 122 Cong. Rec. 5163 (1976)). Senator Burdick stated:

> [T]he conferees acknowledge that from time to time extraordinary reasons may result in delay in making any of the decisions. If a legal remedy is necessary in the absence of

judgment is exercised at a hearing, which should take place near the end of or soon after the completion of the five years

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good faith effort on the part of the Commission, the remedy is to compel the decision, not release from custody. Id (quoting 122 Cong. Rec. 4862). The Seventh Circuit also reasoned that the hearing could not be held before the five years of probation was served because the intent of Congress was that the entire five years be reviewed in determining the likelihood of recidivism. The Section -By- Section Analysis of the House Conference Report states:

> This section further provides that after 5 years of parole supervision each parolee shall he released from further supervision, unless the Parole Commission determines that there is a likelihood that the parolee will engage in criminal behavior. The phrase "likelihood that the parolee will engage in conduct violating any law" is a phrase closely related to the term "release would not jeopardize the public welfare" from section 4206. Both rely on the use of probability in making the judgments required of the Commission by this section. Likelihood is a higher standard upon which the judgment is to be based, but this is only recognition by the Conferees that the Commission has five continuous years of supervision in the community on which to base its comparison with other offenders who have similar backgrounds. Id (citing H.R. Rep. No. 5727, 94th Cong., 2d Sess. 2, reprinted in 1976 U.S.C.C.A.N. 335,365)

of supervision. If the Commission fails to provide a hearing to a parolee through neglect or administrative error, the parolee's remedy is a mandamus action to compel a hearing."[11] We agree with our colleagues on the Seventh Circuit concerning the history and interpretation of the statute.

Penix nevertheless argues that the rulings in Pullia and those from the other circuits have been overruled by the Supreme Court's ruling in Board of Pardons v. Allen.[12] In Allen the Court held that a state parole statute which provided that a state parole beard would release prisoners on parole when certain prerequisites were met created a liberty interest under the Fourteenth Amendment's due process clause.[13] The question whether there is a liberty interest associated with the parole statute, however, is simply irrelevant to the statutory interpretation made in Pullia.

The Allen decision involved state prisoners attempting to force the state parole commission to perform its duties in the

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[11] See, Richardson v. Luther, 692 F.Supp. 1452, 1457 (D.Conn.1988) ("Absent a showing of prejudice or bad faith, the appropriate remedy ... is a mandamus action to compel a hearing, (citing Sacasas, 755 F.2d at 1535)); supra note 10.

[12] 482 U.S. 369, 107 S.Ct. 2415, 96 L.Ed.2d 303 (1987).

[13] Id. at 380-81, 107 S.Ct. at 2422.

constitutionally proper manner. The Court held that the mandatory language in the state statute created a property interest for the prisoners in the Commission's completion of its statutory task. Pullia and the cited decisions on point from the other circuits merely looked to the legislative history to interpret an ambiguity in the particular federal statute at issue. Penix cannot assert anunassailable property interest in his incorrect interpretation of § 4211(c)(1) merely because there is mandatory language in the statute.

We thus concur with the Seventh, Ninth, and Tenth, Circuits' interpretation of § 4211(c)(1) and reject Penix's assertion that those cases have been implicitly overruled by the Supreme Court's holding in Allen.[14]

III.

CONCLUSION

The district court correctly found that Penix had standing to bring this cause of action. It also correctly held that parole supervision does not automatically end upon the expiration of five years following commencement of parole. We hold that the parolee has a right to a hearing concerning the termination of supervision and that the writ of mandamus is available to compel that hearing after the five years has run. We therefore reject the suggestion that the Commission has no jurisdiction to

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[14] See, Richardson, 692 F. Supp. at 1457.

hold such a hearing later than five years after commencement of parole. The district court's decision is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JIMMY LEE PENIX
Petitioner

v. Civil Action No.
CA3-92-0719-P

UNITED STATES PAROLE
COMMISSION
Respondent

ORDER

Before the Court is Plaintiff's Application for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction. After consideration of the motion the Court is of the opinion that the motion should be denied. Therefore the Application for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction is Denied.

IT IS SO ORDERED

Signed April 20, 1992

/s/
JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE